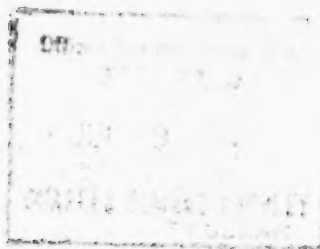


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No. **243**
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In the Supreme Court of the United States

OCTOBER TERM, 1941

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v.

LERNER STORES CORPORATION (MD.)

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

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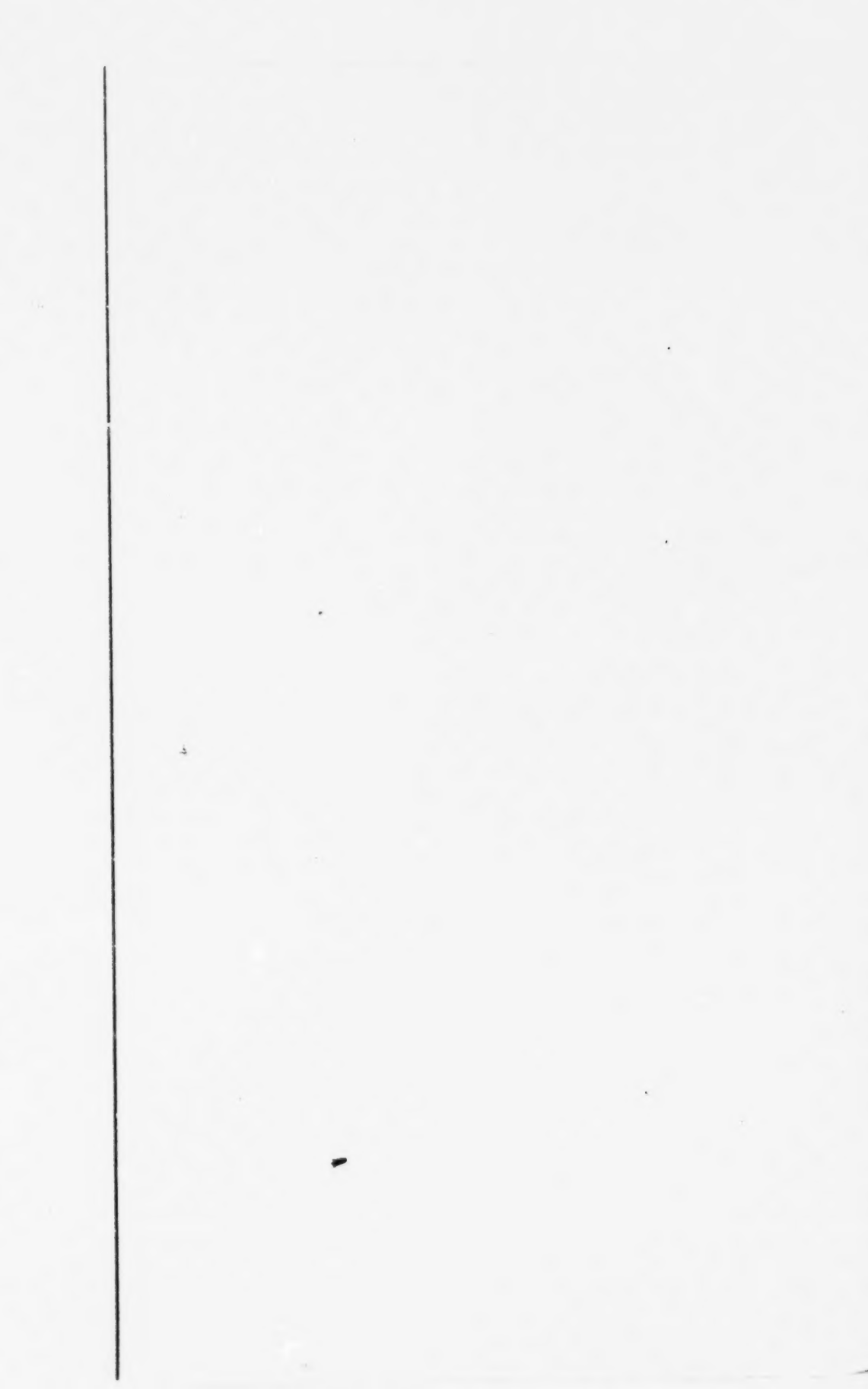
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(I)



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STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on April 12, 1941.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16-18) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 28-30) is reported in 118 F. (2d) 455.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered April 12, 1941 (R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer filed a timely capital stock tax return. In that return, it declared a value of \$25,000 for its capital stock. This figure was entered on the return through a mistake made by an employee. The question is whether the taxpayer has a statutory right to file an amended return changing its declaration of value after the time for filing the original return has expired.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 6-9.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 16-17) are as follows:

Taxpayer, a corporation, was granted an extension of time to September 29, 1936, within which to file its capital stock tax return for the year ended June 30, 1936. Pursuant to that extension, and on September 27, 1936, taxpayer filed a capital stock tax return in which it declared a value of \$25,000 for its capital stock. In the computation of tax on

that return, the tax due was reported as \$25 and the interest was reported as 25¢, making a total of \$25.25. The return was signed by J. H. Hersch and Graham Magee, both of whom were vice presidents of taxpayer, and was duly sworn to by them under oath (R. 16).

The figure of \$25,000 entered on the return was erroneous; the error arose through a mistake made by an employee of the taxpayer (R. 16).

On January 27, 1937, taxpayer forwarded a document prepared on Form 707 (the capital stock tax return form), which was stated to be an amended capital stock tax return for the year ended June 30, 1936. Under item 8 of this form, opposite the words "Declared Value of Entire Capital Stock," the figure of \$2,500,000 was entered. The amount of tax, penalty and interest computed by the taxpayer on the form was \$3,090, consisting of a tax of \$2,500, a penalty of \$500, and interest of \$90 (R. 17).

The mistake in the first return was discovered by Hersch in the course of going over taxpayer's accounts prior to the end of taxpayer's fiscal year, which ended January 31, 1937 (R. 17).

By letter dated July 12, 1937, the Commissioner advised the taxpayer that the declaration of value on the document sought to be filed as an amended return could not be accepted. The amount of money paid in connection with the so-called

amended return was refunded to the taxpayer (R. 17).

In computing the deduction of 10% of the declared value of the taxpayer's capital stock in determining taxpayer's net income subject to the excess-profits tax for the fiscal year ended January 31, 1937, the Commissioner employed the declared value of \$25,000 appearing on the first capital stock tax return (R. 17). On this basis, he determined a deficiency of \$27,947.38 in excess-profits tax (R. 8). The Board of Tax Appeals sustained this action of the Commissioner (R. 18), but the Circuit Court of Appeals reversed (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the taxpayer could amend its capital stock tax return after the statutory period as extended had expired.
2. In failing to hold and decide that the taxpayer was bound by the valuation declared in its original capital stock tax return for the purpose of assessing the related excess profits tax.
3. In reversing the order of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. On June 2, 1941, this Court granted a petition for a writ of certiorari in *Scaife Co. v. Commissioner*, No. 57, October Term, 1941. That petition was based upon an asserted direct conflict with the

decision reached by the court below in the present case. Although, for the reasons pointed out in the Government's memorandum in the *Scaife* case, we believe the two cases to be distinguishable, the court below held an opposite view, stating (R. 30):

A case in the Third Circuit, *Wm. B. Scaife & Sons Co. v. Commissioner*, * * * supports the ruling of the Board. For the reasons already stated we respectfully disagree with it.

In the light of this statement, it is apparent that the court below would have decided the *Scaife* case otherwise than it was decided by the Circuit Court of Appeals for the Third Circuit, and that to that extent at least a conflict of decisions exists. Since this Court granted the petition in the *Scaife* case, the present petition should likewise be granted in order that an authoritative ruling may be made on the related issues presented in the two cases.

2. The decision below is probably in conflict with the principle enunciated by this Court in *Riley Co. v. Commissioner*, 311 U. S. 55, to the effect that there is no statutory right to file an amended return after the expiration of the time for filing the original return.

CONCLUSION

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

JULY 1941.

APPENDIX

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX [as amended by Section 401 of the Revenue Act of 1936, c. 690, 49 Stat. 1648].

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or ~~doing~~ business for any part of such year an excise tax of \$1 for each \$1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at

or prior to the close of the year for which the tax is imposed by this section). * * *

SEC. 106. **EXCESS-PROFITS TAX** [as amended by Section 402 of the Revenue Act of 1936, c. 690, 49 Stat. 1648].

(a) There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value.

(b) The adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year). If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income-tax purposes for the year in respect of which the tax under this section is imposed, computed without the deduction of the tax imposed by this section, but with a credit against net income equal to the credit for dividends received provided in section 26 (b) of the Revenue Act of 1936.

Treasury Regulations 64 (1936 Ed.):

ART. 44. *Original declared value* [as amended by T. D. 4667, XV-2 Cum. Bull. 312, 314.]—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. "First return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner. A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936.

* * * * *

ART. 45. *Adjusted declared value*.—(a) *First taxable year*.—The adjusted declared value for the first taxable year is the original declared value.

If a corporation was in existence during the entire taxable year ended June 30, 1936, the adjusted declared value shall be as of the close of its last income-tax taxable year which ended prior to July 1, 1936. If a corporation makes its Federal

income tax return on a calendar year basis, the value declared must be as of December 31, 1935. If a corporation makes its income tax return on a fiscal year basis, the value must be declared as of the close of such fiscal year ended prior to July 1, 1936.

* * * * *

T. D. 4971, 1940-1 Cum. Bull. 236:

5. Article 44 (a) of Regulations 64 (Capital Stock Tax), approved May 6, 1936, as amended by Treasury Decision 4667, approved July 18, 1936, is amended to read as follows:

(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value can not be changed, amended, or corrected, either by the corporation or by the Commissioner after the expiration of the statutory period (or any extension thereof) within which the return is required to be filed. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935.